TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 154.

SAMUEL H. EMERSON, AS INTERPLEADER, PLAINTIFF IN ERROR,

vs.

W. M. SENTER AND W. T. WILKINS, PARTNERS, AS SENTER & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 30, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between W. M. Senter and W. T. Wilkins, partners as Senter & Co., plaintiffs, Olin G. Moore, as surviving partner of the late firm of A. Butler & Co., defendant, and S. H. Emerson, interpleader, a manifest error hath happened, to the great damage of the said S. H. Emerson, interpleader as aforesaid, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred & seventh.

[The seal of the Circuit Court, Arkansas district, U. S. A.]

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—
HENRY C. CALDWELL,
District Judge.

1½ The execution of the foregoing writ of error appears by the schedule hereto attached.

2 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 10th day of April, anno Domini one thousand eight hundred and eighty-two, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 9, 1882:

SENTER & Co.

vs.

O. G. MOORES, as Surviving Partner of A. Butler & Co., and S. H. Emerson, Interpleader.

On interplea.

Come the plaintiffs, by Smoote and McRae and Compton, Battle and Compton, Esqs., their attorneys, and comes the interpleader herein, S. H. Emerson, by U. M. and G. B. Rose, Esqs., his attorneys, and the parties hereto make and file herein their written
3 agreement, signed by their respective counsel, that the court may try the issues of fact arrising on the interplea of the said S. H. Emerson, interpleader, and thereupon the court proceeds to hear the evidence, and the trial hereof not being concluded, the same is continued until to-morrow morning.

And on June 15, 1882, the following proceeding were had, to wit:

WM. M. SENTER and W. T. WILKINS, Partners under the firm name and style of Senter & Co.,

vs.

OLIN G. MOORES, as Surviving Partner of A. Butler & Co., and Samuel H. Emerson, Interpleader.

On interplea.

Come the plaintiffs, by Smoote and McRae and Compton, Battle and Compton, Esqs., their attorneys, and comes the inter-
4 pleader herein, Samuel H. Emerson, by U. M. and G. B. Rose, Esqs., *their* attorneys; and the court, being now well and sufficiently advised in the premises, finds the issues for the plaintiffs in the attachment against the interpleader.

It is, therefore, considered, ordered, and adjudged that said interpleader, Samuel H. Emerson, take nothing by his said interplea; that the deed of assignment mentioned in said interplea of the said interpleader was and is fraudulent and void; that the stock of goods, merchandise, and other property mentioned in said interplea were rightfully attached as the property of the defendant, Olin G. Moores, as surviving partner of A. Butler & Co., and that said interpleader, Samuel H. Emerson, pay all the costs occasioned by said interplea and the trial thereof, and that execution issue therefor; and thereupon the court files its finding of facts in the case and bill of
5 exceptions taken to the rulings of the court by the said interpleader, Samuel H. Emerson.

And on the same day the following proceedings were had, to wit:

Come the plaintiffs, by Smoote and McRae and Compton, Battle, and Compton, Esqs., their attorneys, and the defendant having been duly served with process herein, and being now three times solemnly called, comes not, but makes default, whereby said plaintiffs' claim against him remains wholly undefended; and the plaintiffs having exhibited and filed herein the two promissory notes on which this

action is founded, and the court having inspected the same and the papers in the case, and being now well advised in the premises:

It is therefore considered, ordered, and adjudged that said
6 plaintiffs do have and recover of and from said defendant, Olin G. Moores, as surviving partner of A. Butler & Co., the sum of ten thousand seven hundred and eighty-four dollars and forty-four cents (10,784.44) for their damages, with interest on six thousand eight hundred and eighty-six dollars and nin*ety*-two cents a portion of said damages at the rate of eight per centum per annum from this date until paid, together with all their costs in and about this suit expended, and have execution therefor.

7 Be it remembered that on this day on the trial of the issue between the plaintiffs and said Emerson, as interpleader, which by the written agreement of the parties was tried before the court sitting as a jury, the court having heard all the evidence made the following finding of facts, viz.:

Defendant Moores was a member of a mercantile firm com-
8 posed of himself, and one A. Butler, under the firm name of A. Butler & Co. Butler having died in December, 1881, Moores, as surviving partner of said firm, on the 23rd day of February, 1882, executed a deed of assignment to said interpleader in words and figures as follows:

Know all men by these presents, that whereas A. Butler and Olin G. Moores have been for some time past copartners in the mercantile trade and business in the town of Malvern, in the county of Hot Springs, and State of Arkansas, under the name, firm, and style of A Butler & Co., and that on the 17th day of December, 1881, the said A. Butler departed this life, leaving the said Olin G. Moores the surviving partner of said firm; and whereas the said firm was, and the said Olin G. Moores as such surviving partner is, indebted in sundry considerable sums of money to divers persons which he is unable to pay in full, and is desirous of providing for the
9 payment of the same, so far as in his power, by an assignment of all the property belonging to him as such surviving partner for that purpose: Now, therefore, I, the said Olin G. Moores, as such surviving partner of said firm of A. Butler & Co., as aforesaid, for the consideration and purposes herein contained, and in consideration of one dollar to me in hand paid by Samuel H. Emerson, of the town of Malvern, in the county of Hot Springs, and State of Arkansas, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey, assign, transfer, and set over unto the said Samuel H. Emerson, his successors and assigns, all the stock in trade, goods, wares, and merchandise, debts, choses in action, property and effects of every description belonging to the said firm of A. Butler & Co., or to me as such surviv-
10 ing partner, mentioned, contained, or referred to in the schedule hereunto annexed, marked "A."

To have and to hold the same and every part thereof to the said Samuel H. Emerson, his successors, and assigns, in trust, nevertheless, to take possession of the same and sell the same as provided by

law and with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectable, and with and out of the proceeds of said sales and collections—

First. To pay and discharge all the just and reasonable expenses, costs, and charges of executing this assignment and of carrying into effect the trust hereby created.

Second. To pay and discharge in full, if the residue of the said proceeds is sufficient for that purpose, all the debts and liabilities now due or to become due from the said Olin G. Moores, as
11 surviving partner of the said A. Butler & Co., with all interest that may be due thereon, to the following creditors, all of whom are hereby preferred, viz:

William M. Senter and W. T. Wilkins, partners doing business in the city of St. Louis as commission merchants and cotton factors, under the firm name and style of Senter & Co., for whatever amount that may be due them on notes and accounts upon a full settlement after all the cotton and other effects now in their hands are sold and property credited, provided that the said amount for which they are to be preferred shall not exceed the sum of twelve thousand dollars.

Crow, Hargadine & Co., of the city of St. Louis, the sum of twelve hundred and fifty dollars; Orr and Lindsley, of the city of St. Louis, in the sum of seven hundred dollars, and if the residue of
12 said proceeds shall not be sufficient to pay the debts, liabilities, and interest due, and that may become due, the said Senter & Co., Crow, Hargadine & Co., and Orr and Lindsley in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratable and in proportion.

Third. And if after the payment of all of the said debts and liabilities due the said firms of said Senter & Co., Crow and Hargadine, and Orr and Lindsley there be any remainder or residue of said property, to pay and discharge in full, if the residue of said proceeds are sufficient for that purpose, all the other debts and liabilities now due or to become due from the said firm of A. Butler & Co. or the said Olin G. Moores, as such surviving partner of said firm,
13 with all interest due or to become due; if the residue of said proceeds shall not be sufficient to pay all the said last-mentioned debts and liabilities and interest in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratable and in proportion.

Fourth. And if after the payment of all said costs and expenses of this trust and the amounts due the creditors herein above preferred, and all the other debts and liabilities in full, there be any remainder or residue of said property or proceeds, to repay and return the same to the said Olin G. Moores, as such surviving partner of said firm of A. Butler & Co., his executors, administrators, or assigns. And in furtherance of the premises, I, the said Olin G. Moores, the surviving partner of the said firm of A. Butler & Co., do here-
14 by make, constitute, and appoint the said Samuel H. Emerson my true and lawful attorney, with full powers and authority

to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, receive, and recover of and from all and every person or persons all property, debts, and demands due, owing, and belonging to the said firm, or to me, the surviving partner of said firm, and to give receipts and discharges for the same, and to execute, acknowledge, and deliver all necessary instruments and conveyances. And I, the said Olin G. Moores, as such surviving partner, do hereby authorize the said Samuel H. Emerson to sign my name to any draft, promissory note, or other instrument of writing which is payable to the
15 order of the said firm, or to me, as such surviving partner, whenever it shall be necessary so to do to carry into effect the object, design, and purpose of this trust.

And it is further provided that the said Samuel H. Emerson have power to employ such agents and clerks as may be necessary in and for the execution of the trust hereby created, and to allow them a just and reasonable compensation for their trouble, and also to rent such place or storehouse as may be necessary for the proper and safe keeping of the property assigned until the same shall be disposed of as the statute in such cases require.

And I, the said Samuel H. Emerson, do hereby accept the trust created and reposed in me by this instrument, and promise and agree that I will faithfully and without delay execute the
16 trust created according to the best of my knowledge and ability and in the manner prescribed by law.

In witness whereof, I, Olin G. Moores, as such surviving partner, and I, Samuel H. Emerson, as such assignee, have hereto set our hands, this 23rd day of February, 1882, Olin G. Moores in his own right and as surviving partner of A. Butler & Co.

SAMUEL H. EMERSON. [SEAL.] [SEAL.]

STATE OF ARKANSAS, } ss:
County of Hot Springs, }

On this 23rd day of February, 1882, before me, J. P. Henderson, a notary public within and for the county of Hot Springs, Arkansas, personally appeared Olin G. Moores and Samuel H. Emerson, parties to the foregoing deed, to me personally well known, and severally acknowledged that they had executed the same for the pur-
17 poses and considerations therein mentioned and set forth, and I do hereby so certify.

Given under my hand and notarial seal, this 23rd day of February, 1882.

[L. S.] J. P. HENDERSON,
Notary Public, Hot Springs County, Arkansas.

Certificate of Record.

STATE OF ARKANSAS, } ss:
County of Hot Springs, }

I, John W. Keith, clerk of the circuit court and *ex officio* recorder

for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 24th day of February, A. D. 1882, at 9 o'clock p. m., and 7 pages of the same is now duly recorded with the acknowledgment and certificate thereon, in record book, vol. "N," on pages 299, 300, '1, '2, & '3.

In testimony whereof, I have hereunto set my hand and
18 affixed the seal of said court, this 25th day of February, A. D. 1882.

JOHN W. KEITH, *Clerk*,
By J. E. CHAMBERLAIN, *D. C.*

19 The interpleader accepted said conveyance, as did also certain of the preferred creditors of the assignor therein mentioned. The defendant Moores individually, and as surviving partner, was insolvent at the date of the making of said deed of assignment. The debts of said firm of A. Butler & Co. largely exceeded their assets. The defendant Moores represented in the recitals in said deed of assignment and verbally to his creditors that it was his purpose to make "an assignment of all the property belonging to him
20 as such surviving partner," and after making said assignment represented to his creditors that he had done so. The property actually conveyed was, by the terms of the deed, restricted to the property "mentioned, contained, or referred to in the schedule" annexed to said deed and made part thereof; and the said defendant Moores, for the fraudulent purpose of cheating, hindering, and defrauding his creditors, omitted from said conveyance and schedule five hundred dollars worth of goods which belonged to the firm of A. Butler & Co., and which at the date of said deed of assignment belonged to said defendant Moores, as surviving partner of said firm, the said assignor claiming said goods as exempted when they were not so in fact. That said defendant Moores also fraudulently withheld and omitted from the schedule annexed to said deed of assignment, for the purpose of cheating his creditors out
21 of the same, one thousand dollars in cash and other property exceeding in value fifty dollars, which he held as surviving partner of said firm of A. Butler & Co., and which he did not assign, transfer, or deliver to his assignor. The recital in said deed of assignment, and the representations verbally made by said defendant to his creditors that the said deed of assignment conveyed to the assignee all the assets of the late firm of A. Butler & Co., were false in fact, and were made for the fraudulent purpose of misleading and cheating his creditors out of more than fifteen hundred dollars in goods and money, which he did not convey or transfer to his assignee by the terms of said deed, but which he fraudulently retained and appropriated to his own use, and he made said
22 deed of assignment at the time and in the manner he did for the purpose of enabling him to perpetuate said fraud. Neither said assignee nor said preferred creditors who accepted the same had any knowledge of said fraud until after they had accepted said conveyance. Upon the foregoing facts the interpleader asked the court to declare the law to be—

1st. That a sole surviving partner of an insolvent firm who is himself insolvent has the right to make a general assignment for the benefit of creditors of all the firm assets with preference to such creditors as he elects to prefer.

2nd. The interpleader further asked the court to declare the law to be—

That, notwithstanding the fraud on the part of the assignor, the deed would not be void without some knowledge of said
23 fraud or participation therein on the part either of the assignee or the accepting creditors, and that the finding should be on this ground in favor of the interpleader.

But the court refused so to declare, but held the reverse of the propositions to be the law and that said deed of assignment upon the facts found was void, and it is so adjudged.

Signed and ordered to be filed, this 15th day of June, 1882.

HENRY C. CALDWELL,
U. S. Dist. Judge.

Endorsed: Filed June 15th, 1882. Ralph L. Goodrich, clerk.

At the time of making said ruling, said interpleader ex-
24 cepts thereto, and tenders here this his bill of exceptions, which being found correct is signed, sealed, and made part of the record herein on this 15th day of June, 1882.

HENRY C. CALDWELL, *Judge.* [SEAL.]

Endorsed: Filed July 15, 1882. Ralph L. Goodrich, clerk.

And on April 11, 1882, the interplea of Sam. H. Emerson was filed, which is as follows:

I state that I am the owner of the property attached in this action and entitled to the possession thereof, having acquired title thereto by virtue of a deed of assignment for the benefit of creditors executed to me as trustee by the defendant.

SAM. H. EMERSON.

Subscribed and sworn to before me, this 7th day of April, 1882.

JOHN W. KEITH, *Clerk.*
By J. E. CHAMBERLAIN, *D. C.*

25 Endorsed: Filed April 11, 1882. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

And on July 18, 1882, the following affidavit was filed in the case:

I state that the value of the property attached in this action and for which I have interpleaded exceeds the sum of five thousand dollars.

SAM. H. EMERSON,
Assignee.

Subscribed and sworn to before me, this 17th day of July, 1882.

J. P. HENDERSON,
Notary Public for Hot Springs County, Arks.

Endorsed: Filed July 18, 1882. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

26 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said court, this 18th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and 7th.

[The seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

27 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein Samuel H. Emerson, as interpleader, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment on interplea rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the district court, this 12th day of August, A. D. 1882.

[The seal of the Circuit Court, Arkansas District, U. S. A.]

HENRY C. CALDWELL.

Attest: RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

28 [Endorsed:] We acknowledge service of the within citation this 12th day of August, 1882. Senter & Co., by F. W. Compton.

Endorsed on cover: E. Arkansas C. C. U. S. No. 154. Samuel H. Emerson, as interpleader, plaintiff in error, *vs.* W. M. Senter and W. T. Wilkins, partners as Senter & Company. Filed 30th October, 1882.

118-3

Office Supreme Court U. S.
FILED.
NOV 21 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

SAMUEL H. EMERSON, as interpleader, } *Plaintiff in error.*

v.

W. M. SENTER and W. T. WILKINS, partners as SENTER & CO.

NO. 154.

In error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

Mitchell & Bettis, Printers and Binders, Little Rock, Ark.

IN THE

Supreme Court of the United States.

SAMUEL H. EMERSON, as interpleader, } *Plaintiff in error.*

v.

W. M. SENTER and W. T. WILKINS, partners as SENTER & CO.

NO. 154.

In error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

One Moores, the surviving partner of the firm of A. Butler & Co., made a general assignment to the plaintiff in error as trustee for the benefit of the creditors of the firm. Rec. 8.

The property assigned was attached by the defendants in error on the ground that the assignment had been made

with fraudulent intent, the attachment was sustained, and the interplea of the plaintiff in error overruled. Rec. 4.

The Court found that the assignor had fraudulently reserved from the assignment a part of the property, but that this fraud had not been participated in by the assignee or the creditors represented by him, who had accepted the assignment in good faith. Rec. 19 to 22.

The plaintiff in error asked the following declarations of law:

1. That a sole surviving partner of an insolvent firm, who is himself insolvent, has a right to make a general assignment for the benefit of creditors of all the firm assets, with preference to such creditors as he may prefer.

2. That, notwithstanding the fraud on the part of the assignor, the deed would not be void without some knowledge of said fraud, or participation therein, on the part either of the assignee or the accepting creditors. And that the finding should be, on this ground, in favor of the interpleader. Rec. 22.

The Court refused so to declare, and the interpleader excepted. Rec. 23.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the surviving partner had no power to make the assignment.

2. The Court erred in holding that the assignment was vitiated by the fraud of the assignor, not participated in by the assignee nor by the creditors.

ARGUMENT.

I.

That a surviving partner has the power to make an assignment for the benefit of creditors, has been settled by the case of *Hoyt v. Sprague, 103 U. S. 613*, where such an assignment was upheld and enforced. The power naturally results from the full control which the surviving partner has over the partnership assets.

The power to prefer one creditor to another is an incident to the power to assign.

Brooks v. Marbury, 11 Wheat. 78.
Clarke v. White, 12 Pet. 200.
Tompkins v. Wheeler, 16 Pet. 106.
Conway ex Parte, 4 Ark. 303.
Hempstead v. Johnson, 18 Ark. 123.
Mandel v. Peay, 20 Ark. 329.

There can be no reason why surviving partners should be made exceptions to this rule. They can prefer creditors at any time by payment; and if they can prefer by payment, they can prefer by an assignment, which is only a means of raising a fund for payment.

II.

The Arkansas Statute of Frauds, under which the assignment was held to be invalid was adopted in 1837, and is as follows:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rent issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree, or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers, prior and subsequent, shall be void."—Ark. Dig. 1883, Sec. 3374.

The Bankrupt Act provided that the assignee should take the property subject to all equities; and some Courts have held that an assigneee for the benefit of creditors occupies no better position. But no sufficient ground can be assigned for the ruling. When a man is insolvent, and his creditors prevail on him to execute an assignment for their protection, and they and their assignee take the property in good faith, their claims ought not to be defeated because the assignor has acted fraudulently. Having acquired the entire interest in the property assigned, they ought to stand as well as though they had obtained a mortgage or deed of trust upon it. The mere fact that the assignor had concealed some of his property from the assignee is no reason why the part which he has turned over, and which has been received in good faith, should not be applied to the payment of debts.

Such is the view which has been adopted by this Court.

In *Marbury v. Brooks, 2 Wheat. 556*, it appeared that one Fitzhugh had made an assignment to Marbury with the design of securing immunity from prosecution for a forgery which he had committed. This intent was known to Marbury, but not to the creditors secured by the deed; and upon an attachment of the property, it was held that they were entitled to the protection accorded to *bona fide* purchasers, and were in no wise affected by the fraudulent motives of the grantor.

This decision, and the grounds upon which it was reached, were afterwards affirmed in the case of *Brooks v. Marbury, 11 Wheat. 78*. Both decisions, delivered by the Chief Justice, are evidently the result of mature consideration, and had the sanction of the undivided Court. They should be conclusive of the case at bar. To overturn them now, after they have been for so many years the unquestioned doctrine of this Court, would throw this branch of the law into confusion, and would be unjust to the public, who have learned to look upon them as establishing a rule of property, and have acted upon them accordingly.

Nor does the rule require amendment. It is inherently just, and has been adopted as the law in the States of Ohio, Illinois, Missouri, Virginia, Tennessee, Michigan, Alabama and Arkansas.

Bancroft v. Blizzard, 13 Ohio, 30.
Thomas v. Talmadge. 16 Ohio St.. 439.
Meyers v. Kinzie, 26 Ill., 36.
Gates v. Labaume, 19 Mo., 17.

Wise v. Mimer, 23 Mo., 237.
State v. Keeler, 49, Mo. 548.
Sipe v. Earman, 26 Gratt., 563.
Wilson v. Davenport, 7 Cold., 32.
Hollister v. Loud, 2 Mich., 309.
Abercrombie v. Bradford, 16 Ala., 560.
Governor v. Campbell, 17 Ala., 566.
Cornish v. Dews, 18 Ark., 172.
Hempstead v. Johnson, 18 Ark., 124.
Mandel v. Peay, 20 Ark.. 329.

It having been settled by three adjudications of the Supreme Court of Arkansas that the creditors provided for in the assignment are not to be affected by the fraud of the assignor, it has become a construction of its Statute of Frauds, and a rule of property for its citizens, which will be enforced in the Courts of the United States.

Brashear v. West. 7 Pet., 589.
Loyd v. Fulton, 91 U. S., 479.
Sumner v. Hicks, 2 Black, 532.
Jaffrey v. McGehee, 107 U. S., 364.

Respectfully,

U. M. ROSE.

118-3

RECEIVED
FEB 24 1886
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

SAMUEL H. EMERSON, *as interpleader, Plaintiff in Error,*

vs.

W. M. SENTER AND W. T. WILKINS, *Partners as Senter & Co.*

No. 154.

In error to the Circuit Court of the United States for the Eastern District of Arkansas.

Brief for Defendant in Error.

THOS. C. McRAE.

R. O. Polkinhorn & Son, Printers.

IN THE SUPREME COURT OF THE UNITED STATES.

SAMUEL H. EMERSON, *as interpleader, Plaintiff in Error,*

vs.

W. M. SENTER AND W. T. WILKINS, *Partners as Senter & Co.*

No. 154.

In error to the Circuit Court of the United States for the Eastern District of Arkansas.

Brief for Defendant in Error.

STATEMENT OF FACTS.

In reply to the two assignments of error, relied upon by appellant, we submit the following:

I. *That a surviving partner has no power to make an assignment of the partnership assets in his hands, for the benefit of creditors, with preferences.* And therefore, the instrument under which appellant claims is bad.

An assignment with preferences may involve, and actually does involve, benefits to the surviving grantor in the way of future good-will from the preferred creditor, which can in no apparent way involve

a similar benefit to the estate of the deceased partner.

'Surviving partners are held strictly as trustees.' If the fund in their hands is not enough to pay the partnership debts in full, all debts being payable equally, they must do nothing to disturb this equality.

Parsons Part (2nd E.), 442, 443.

Wherever property is held by a person as a trustee for the benefit of creditors and others, he cannot assign the same with preferences.

Robbins vs. *Embry*, 1 Am. & M. (Ch.), 207, 258, 264.

Richards vs. *N. Hampshire Ins. Co.*, 43 N. H., 263.

The partner having control of the assets of a dissolved co-partnership under an agreement empowering him to wind up the business, has no authority to make an assignment for the benefit of the creditors of the partnership with preferences, and such an assignment is illegal.

Marsh vs. *Bennett*, 5 McLean, 117, 122.

A surviving partner, it has been held upon other grounds, cannot make an assignment of the partnership assets for the benefit of partnership creditors with preferences.

Bancroft vs. *Snodgrass*, 1 Colo., 430, 439.

The case of *Hoyt* vs. *Sprague*, 103 U. S., 613, does not seem to us to be in point. To use the language of Mr. Justice BRADLEY:

> "The general object of the bills [in that case was] to establish a lien and trust in favor of the complainants, as grandchildren of William Sprague, Sen., against the property of the A. & W. Sprague Manufacturing Company, now in the hands of Chaffee, the assignee, each to the extent of one-twenty-fourth part of the whole property; that being the amount of their interest in the property of the former firm of A. & W. Sprague, which was transferred to the corporation in 1865, whilst the complainants were infants, in fraud, as they allege, of their rights."
>
> (Ib., p, 614.)

The corporation made the assignment to Chaffee (Ib., p. 623). The power of surviving partners to make assignments with preferences was there, apparently, not involved nor considered.

If the case is an authority which can be made to bear upon the points involved in this case, it is rather to the effect that the assets of an insolvent partnership should be applied ratably by surviving partners to pay the partnership debts.

c. It is claimed that the power to prefer is incident to the power to assign.

We deny the sequence. Limited partnerships may make general assignments, and yet may not make preferences.

Burrill on Assignments, 3d Ed., Secs. 90, 171;
Arkansas Digest, 1884, Sec. 4842.

And, if the above authorities are good to prove anything, so may surviving partners make general assignments, but without preferences.

d. It is also said that inasmuch as surviving partners can prefer creditors at any time by payment, so can they by assignment.

But paying or securing a creditor is not equivalent to preferring him in an assignment.

Burrill, 2d Ed., Secs. 167, 168;

Wall vs. *Lakin*, 13 Met., 167; and see pp. 171, 172;

U. S. vs. *Bank of U. S.*, 8 Rob. (La.), 262, 404.

We do not think that this Court should hold the right of preference to be in an insolvent surviving partner of an insolvent firm, unless compelled to do so by an overwhelming weight of authority. We think if the courts had the question of preference among creditors to deal with now for the first time, that they would not permit it at all. And, hence, we argue that it ought not to be extended to cases, upon the faces of which it is calculated to work injustice in a high degree, and give opportunity for the perpetration of gross frauds.

II. *That the fraud of the assignor is alone the criterion.*

a. The assignee gives no consideration, ordinarily understood as valuable, by which his *status quo* is changed. He has not shown that any has been given

here. The creditors ordinarily give no additional consideration. They are not shown to have given any here. An assignment, when there is no complete statutory system, is a bankrupt act created by the assignor, for the benefit primarily of himself, which usually covers up his frauds, and is generally most favorable to himself. Under circumstances such as these, the law ordinarily should give no greater rights to one class of creditors than the other, and hold (as against those who condemn and repudiate the fraud) that the instrument should be upheld at their expense, and in favor of creditors whose action is to uphold an instrument originally conceived in the interest of his own fraud by an assignor. Usually among the latter class of creditors will be found those most dilatory in the assertion of their rights, and who for that reason alone have not been found among the attaching creditors. And so we think that if the deed was fraudulent as to the assignor, it is void as to the rights of the assignee under it.

The assignee is affected with notice of assignor's fraud—that is, the deed, if fraudulent, is void as to assignee's rights, whether assignee has actual notice of, or participates in the fraud or not. The assignee takes the place of the assignor, and is in no better position.

Haggerty vs. *Palmer*, 6 Johns., Eq. Rep;
Root vs. *French*, 13 Wend., 570;
Mackin vs. *Keans*, 5 Cowen, 555;
Coddington vs. *Bay*, 20 Johns., 639;

Coddington vs. *Bay*, 5 Johns., Eq. R.;
Petru vs. *Clark*, 11 Sarg. & Rowle, 377;
McCarty vs. *Springer*, 3 Rowle, 159;
Dickinson vs. *Tallahust*, 4 Page, 215;
Hunt vs. *Weiner*, 39 Ark., 70;
See body of opinion 74 and 75—
Adler vs. *Ecker*, 1 McCrary, 266;
Gere vs. *Murray*, 6 Minn., 307;
Knowles vs. *Lord*, 4 Whar., (Penn.) 500;
Lesber vs. *Getman*, 9 N. W., 585;
Pearson vs. *Manning*, 2 Mich., 450;
Flanagin vs. *Lampman*, 12 *Ib.*, 58;
Farrington vs. *Sexton*, 43 Mich., 454;
Stickney vs. *Crane*, 35 Vt., 89;
Hairgrove vs. *Millington*, 8 Kans., 480, 486;
Ruble vs. *McDonald*, 18 Iowa, 493;
Lampson vs. *Arnold*, 19 *Ib.*, 479;
Stone vs. *Marshall*, 7 Jones, (N. C.,) 300;
Irwin vs. *Keen*, 3 Wharton, 347;
Swan vs. *Craft*, 124 Mass., 455;
Clements vs. *Berry*, 11 How., U. S., 398;
Burrill on Assm., 391 and 484;
2 Pomeroy Eq. Jur., p. 209 and 749;
Bump Fraud Cond., (2d Ed.,) p. 483.

It is true that in the case of *Clements* vs. *Berry*, the court simply laid down the rule that an assignee for the benefit of creditors is not a purchaser for value. But if that is the position he occupies it is difficult to conceive how a fraudulent conveyance in his hands can be protected, more than it would be in

the hands of any other voluntary grantee. He would certainly be open to all equities that might exist against the assignor.

German Sav. Bk. vs. *Adae*, 1 McCrary, 501, 505 ;
Wade on Notice, §§ 431, 436;
Burrill, § 402;
U. S. vs. *Buford*, 3 Pet., 12;
Cowdrey vs. *Vandenburg*, 101 U. S., 575.

b. Any person reading through the text of Burrill on Assignments will, we think, be convinced of the fact that the law of assignments for the benefit of creditors is, in its most important particulars, *sui generis ;* that the general law relating to trusts and mortgages is not, in all things, applicable thereto ; that when the Statutes of Elizabeth were passed assignments for the benefit of creditors were practically unknown ; that there have grown up doctrines respecting this branch of jurisprudence as to some questions harmonious, as to others inharmonious, yet, on the whole, peculiar thereto, just as there have grown up doctrines relating to telegraphy and railroads respectively, distinct from the ordinary law of bailments, of municipal bonds, as distinct from the ordinary law of municipal contracts, of boards of trade and stock exchanges, as distinct from the ordinary law of corporations, of municipal corporations in this country as distinct from similar institutions abroad. The law of such assignments is the result of the needs of commerce.

Though, in ante bellum days, while Arkansas had no commerce to speak of, in three cases cited by the appellant, the Supreme Court did, without reference to authority, hold, in chancery, that deeds of trust were not bad unless the creditors' fraud concurred with that of the grantor; its present view, based upon more mature consideration, points the other way. For, at the end of a series of well considered cases, in *Hunt* vs. *Weiner*, 39 Ark., 70–75, the Court use this language :

> "Perhaps the rule which requires the grantee to participate in the fraud, in order to avoid the deed (a deed of assignment), has no just application, except in case of purchasers, or persons who have parted with some valuable right." Ib., 75, 76.

Any other view would afford an assignor vast opportunities for effectually compassing fraud.

c. Beside the Arkansas cases referred to, appellant's counsel cites decisions of this Court, and of Ohio, Illinois, Missouri, Virginia, Tennessee, Michigan, and Alabama, to sustain his position. A review thereof will show :

That the decision in Marbury *vs.* Brooks (7 Wheaton, 556) was unnecessary, and therefore *obiter* upon this point ; for the Court had previously held that "to advance money for a son-in-law to repair the frauds he had committed, even with the hope of concealing the perpetration of them, is not, we think, an offense which may not be

excused; nor can a security taken for the repayment of money so advanced be deemed fraudulent."

Ib., 575.

And the Court further said that "if the notes were to be taken upon condition that the holders would forbear to prosecute the criminal, or if the repayment of the money advanced were to depend upon his escape from prosecution, the validity of the contract might well be questioned." (*Ib.*) The doctrine respecting contracts intended to compound felonies was involved.

The case of *Brooks* vs. *Marbury* (11 Wheaton, 78), was also a case where the doctrine of compounding a felony was involved.

We submit that to constitute a compounding of felony the minds of the party seeking non-action and the party whose non-action is desired must meet and concur, and that therefore in such cases no fraud can be complete—no mere act of the grantor or his assignee, or both combined, can amount to a fraud—such as the law condemns.

Pollock, Cont., 318, 319;
Wharton, Cont., § 483.

But that this is not true of such frauds as are implied in ordinary conveyances in disregard of the rights of creditors is obvious. For a mere volunteer, however good may be his intent, is incapable of holding property conveyed to him as against prior creditors.

Sexton vs. *Wheaton*, 8 Wheat., 229.

The case in 13 Ohio, 30, was not very well considered. No authorities are considered, the opinion is brief and a statute (referred to in brief for appellant), seemed to exist bearing on the question. Henry Stanbery took an opposite view. We see nothing in 13 Ohio St., 498, that seems to be in point; that decision was based on a statute. The case in 26 Ill., 36, show that the point was not before the Court, it having held that there was no evidence of any fraud on the part of assignor or assignee.

In 19 Missouri, 17, the doctrine was based on statute, and the fraud was subsequent to the assignment. The opinion in 23 Missouri, 237, is brief and is based entirely on the case in 19 Missouri.

The opinion in 49 Missouri, 548, is short, no authorities are cited, and it seems to have been made in view of a statute which prevails there. In the case reported in 26 Gratton, 563, no fraud existed, and therefore its ruling upon the point now under consideration was *obiter*. The balance of the doctrine in that case is opposed to the views of this Court in *Lukins* vs. *Aird*, 6 Wall., 78.

In 7 Cold., 32, no authorities are considered, and the point is arbitrarily ruled.

The case in 2 Michigan, 309, is superseded and overruled by the later case in that State. (See authorities *supra*.) The opinion in 17 Alabama, 566, shows that court would have ruled the point as we

contend, had the matter been *res nova* in that State. (*Ib.*, 571.)

A careful resume of the authorities will show that the most of those cited by appellant's counsel are either not in point, or are based upon some statute, or upon a hasty and ill-considered impression, authorities pro and con not being considered.

We deny that this Court or the Supreme Court of Arkansas are opposed to the view of the lower court, or that the view it entertained is opposed to principle and the weight of authority. It is possible that Ohio and Missouri would not be with the appellant, if no statute prevailed. We deny that Alabama would be with him if the question were *res nova*. We deny that Michigan is with him. We admit that Virginia and Tennessee are with him, but that they are opposed to sounder views as expressed by the judges in Vermont, Massachusetts, New York, (as shown by Judge Poland in 35 Vt., *supra*), Pennsylvania, North Carolina, Michigan, Minnesota, Iowa, Kansas, Arkansas, and the Federal Circuit Court in Minnesota and Arkansas, and the principle stated in 11 Howard.

When a complete system, or what may be regarded as a complete system, of insolvency exists, under statute, analogous to the bankrupt act, there is reason for holding the fraudulent intent of the grantor to be immaterial, for such systems are aimed to thwart such an intent. But where no system exists, where the assignor has pretty much his own

way in making an assignment, as in Arkansas, there is great need for holding that his fraud shall vitiate the instrument, especially if the bond of the assignee, as in Arkansas, calls upon him to carry out the terms of the assignment. (Arkansas Digest, 1884, Sec. 305.) Otherwise a premium will be put on fraudulent assignments. Moreover, there is some difference between the attitude which chancery courts and courts of law occupy. The former, as was the case in Arkansas, in the three cases cited by appellant, may, to carry out equitable doctrines, and give proper effect to an instrument that might be bad at law hold certain transfers to be in substance good, which would be disapproved and condemned at law. That there is a difference between law and chancery is established. (See *Clements* vs. *Moore*, 6 Wall. The present is a proceeding at law.

2d. If the question, as to whether an assignee shall or shall not be bound by the fraud of the assignor, is a question arising under State Statute, then, unquestionably, this Court will follow the decisions of the State Court ; unless the question seems still to be open there. *Burgess* vs. *Seligman*, 107 U. S., pp. 33, 34, 35.

But if the views of the Federal Circuit Court correspond with the latest adjudication of the State Court, the decision will hardly be reversed on account of prior rulings of the State Court. *Leffingwell* vs. *Warren*, 2 Black, 599.

If, however, that question is one in general jurisprudence, then this Court will not be bound by the decisions of the State Courts; but will strike out a path for itself, prefers to do so.

Carpenter vs. *Ins. Co.*, 16 Pet., 495, 511;
Chicago vs. *Robbins*, 2 Black, 418.

Respectfully,
THOS. C. McRAE.

RECEIVED
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JAMES H. McKENNEY
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IN THE

SUPREME COURT

OF THE UNITED STATES.

S. H. Emerson, Interpleader,

v.

Wm. M. Senter, et al.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

Mitchell & Bettis, Printers, Little Rock, Ark.

IN THE

SUPREME COURT

OF THE UNITED STATES.

S. H. Emerson, Interpleader,

v.

Wm. M. Senter, et al.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

Since the filing of our original brief herein, the Supreme Court of Arkansas has again decided that an assignee for the benefit of creditors is a purchaser for value. The opinion of the court, which is still in manuscript, is as follows:

"Eakin, J. Davis & Ketcher, were a firm of hardware merchants in Little Rock. On the 26th of February, 1884, Jno. D. Adams filed this bill against them and other parties, alleging: That being in failing circumstances, they had assigned their stock of merchandise, fixtures, notes, accounts, etc., to J. S. Whiting, in trust, to sell and apply the proceeds to their liabilities, in the following order:

"1st. A debt of $4,000, owing to the Exchange Bank of Little Rock.

"2d. A debt of $3,000, owing to the Merchants National Bank of Little Rock.

"3d. Certain other indebtedness described in the deed, owing to S. E. Davis and Mary Weigel. These to be paid in full. The residue to be applied upon all the remaining indebtedness of the firm.

"That the trustee was taking an inventory, with the view of filing a bond with the clerk, as required by statute, and selling the stock at public auction. That this would cause a great sacrifice, as much of the stock consisted of agricultural implements, not immediately in demand; whereas, with proper precautions, it might be made to realize a good price. He states that he is a surety of Davis & Ketcher, upon the debt to the Exchange Bank, without indemnity; and that he will suffer loss unless that debt is satisfied out of the assigned property. He therefore asks that a receiver be appointed to take charge of the effects, and to collect such accounts as he can, and report those he cannot collect, to be sold.

"Upon filing the bill, the court appointed the assignee receiver, who gave bond as such.

"The appellant, Bridgeford & Co., is a corporation under the laws of Kentucky. On the 2nd of March, 1884, it filed a petition in the case, showing:

"That it is one of the non-preferred creditors; and charg-

ing that the firm of Davis & Ketcher, in November, 1883, through Davis, obtained a portion of the stock on hand from them by purchase, under fraudulent representations as to facts and circumstances affecting their solvency and ability; and that a large portion of such goods can be identified in the hands of the receiver. It claims the right to rescind the contract and reclaim the goods, on account of the fraud; and insists also that if it may not do that, it is entitled to a lien upon all the goods it may identify, under the act of March 9th, 1877. Their claim is for $2,635.08. Other points are presented by the petition, but these are sufficient to explain the nature of the case, and the contention as to error. There is a prayer for general relief.

"Davis and Ketcher answered this petition, denying all the material allegations as to fraud.

"Other creditors, it seems, made similar claims as to goods sold by them for goods which might be identified. By consent the receiver was ordered to proceed with the sales, keeping separate the proceeds of the different lots claimed by the several inter-pleaders, and which might be identified, satisfactorily to his mind. The goods were sold, and the money is now awaiting the order of the court.

"Upon hearing, the chancellor refused the prayer of the petitioner, Bridgeford & Co., with costs, giving it, however, a personal decree against Davis & Ketcher for its debt, in the sum of $2,570.52; and directing that the receiver, after deducting costs, should pay out the sums in hand according to the provisions of the deed of assignment. The corporation appealed.

"First as to the fraud. The chancellor, in a written opinion, finds that the evidence did not sustain it; and, if there had been fraud originally, the sale was afterwards affirmed.

"The sales were made to the firm in November, by the agent of the company of Bridgeford & Co., dealing with Davis. There is some evidence of positive representations as to facts, which standing alone, would be wholly inconsistent with good faith, but it is to some extent contradicted by other testimony; and some of the representations or remarks are such, or were made at such times, that we cannot infer that they were inducements to the credit given. The impression made upon us by the testimony is that whilst Davis was over sanguine as to the business of the firm, and exaggerated its ability, yet that he is not clearly shown to have spoken or acted with set purpose to obtain credit by fictitious representation. The firm really did meet all its obligations in February, just before the assignment, with which this suit was contemporaneous. Fraud must be shown with a reasonable degree of clearness, and we could not say that the proof of it preponderates here to such an extent as to make it clear that the chancellor erred in his finding.

"Besides, the decision of the chancellor is strengthened by events occurring after the purchase in November, 1883. Ample time had elapsed for further enquiries into the condition of Davis & Ketcher, when, in February, the agent of the corporation became pressing for security. It is not positively shown that he was then advised actually of the

means of the firm, but it is quite certain under the circumstances that men with ordinary business energy and capacity might have become so advised, and it is a fair presumption of fact, that the agent of Bridgeford & Co. was. If he had felt himself to have been misled and deceived, then was the time to have asserted the right of the corporation to rescind the sale, and reclaim the goods. He did not do so, but agreed to be content if the endorsement of the wife of Davis could be got upon some drafts drawn for the debt on the 26th of December. Davis took the drafts, procured the endorsements, and delivered them to the agent. This was a ratification of the original sale. One who claims to rescind a contract of sale, must proceed with reasonable diligence, and make such enquiries in reasonable time as would be prompted by reasonable caution in business tranactions. It may be expected that persons negotiating for purchases on a credit will present their affairs in the most favorable light, and their representations made in general terms cannot be relied upon prudently.

"It does not appear from the written opinion that the chancellor took into consideration the point made as to the lien of the vendor company under the act of March 9th, 1877. If it had a lien fixed upon the goods and remaining until payment, or until the goods should have passed into the hands of *bona fide* purchasers for value, and without notice, then the relief sought by the appellant should have been granted independently of the fraud.

"This is "an act for the recovery of purchase money, contracted for property in possession of the vendee." The

first section provides that in an action brought for the recovery of purchase money, of property remaining in the possession of the vendee, the latter shall not include that property as exempt from seizure and sale under attachment or on execution, or other process from any court for the collection of any debt upon claim of the plaintiff. There is nothing in this to create a lien unless we can say that a creditor has a lien upon all the property of his debtor not exempt from execution. The second section provides that in any *such* action, that is, an action to recover the purchase money of a chattel sold on credit, the plaintiff upon petition duly verified, may at the beginning of the suit, or during its pendency, obtain an order from the court or clerk directing the officer to take and hold the property subject to the order of the court. This is a statutory process for impounding the chattel to prevent alienation *pendente lite*, and does not imply that a lien exists independently of the process. It is analogous to a specific attachment, which is sometimes given in cases where a previous lien did exist, but the previous lien is in no view essential to support it. The whole matter is statutory and the lien must be found in the plain words, or obvious intent of the statute.

"The third section is not relevant to the question now under consideration, and the fourth and last provides that upon showing by the plaintiff that the property has been "disposed of or concealed" so that the order cannot be executed, the court may compel the attendance of defendant, and examine him on oath as to the situation of the property, and enforce its order as in cases of contempt.

"As the statute expressly applies only to property remaining in possession of the vendee, it cannot imply a right on the part of the plaintiff to follow the property in the hands of one who in good faith has acquired from the vendee the possession and ownership. Construing the sections together it means that the defendants shall not be allowed to conceal the property, or so dispose of it that it cannot be found whilst it still remains constructively in his possession and subject to his control.

"*An assignee, who takes property not subject to redemption, but to sell the same and distribute the proceeds amongst third parties, takes bona fide. He is not indeed such an innocent purchaser for value, as to hold against an equity of a third party, which is in the nature of a lien upon the property itself; but in the absence of any such lien he takes absolutely, so far as the assignor is concerned, and is only under obligations to apply the property to the purposes of the trust.*

"A case might arise, in which the value of the article might be considerably in excess of the purposes of the trust, leaving a portion of its value to result to the assignor. How far the vendor in such case might be entitled to be heard in equity to claim this surplus against exemptions, or against general creditors, is a question not now made, or important to be determined. It is not the claim here set up, which is for a preference over the creditors named in the deed of assignment.

"We think the statute does not give a continuous sub-